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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STUART CARSON, HONG CARSON, a/k/a "Rose Carson," PAUL COSGROVE, DAVID EDMONDS, FLAVIO RICOTTI, and HAN YONG KIM,

Defendants.

Case No. SA CR 09-0077-JVS

REPLY MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE BY IMI plc AND CONTROL COMPONENTS, INC.

Assigned to: Hon. James V. Selna

Date: October 13, 2009
Time: 8:00 a.m.
Place: Courtroom 10C
411 West Fourth Street
Santa Ana, CA 92701-4516

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I. INTRODUCTION

The Court should permit IMI plc ("IMI") and Control Components, Inc. ("CCI") (collectively "the Companies") to intervene to oppose Defendants' Joint Motion to Compel Discovery ("Motion to Compel"). Defendants concede that the Companies may intervene to assert claims of privilege over the material requested but fail to acknowledge that there is far more privileged material at issue than the few privileged charts produced to the government pursuant to a non-waiver agreement. The Companies also have standing to assert privilege claims over (1) the "investigation materials" generated by Steptoe & Johnson LLP ("Steptoe") during a privileged internal investigation on behalf of IMI and a Special Committee of its Board of Directors, and (2) the substantial volume of privileged documents in the electronic databases compiled by Steptoe and Ernst & Young ("EY") during the investigation, which Defendants seek in their entirety. Since CCI's Plea Agreement does not require it to produce privileged documents to the government, none of these materials are conceivably in the government's constructive possession for purposes of Rule 16.

The Companies also have standing because of the significant burden and expense they would face if the Court were to grant the Motion to Compel and order CCI to produce a volume of documents exponentially greater than the materials produced by the Companies during the investigation. Defendants erroneously contend that CCI faces no burden because it could merely copy the electronic databases in their entirety. However, the Plea Agreement does not obligate CCI to produce all documents in its possession upon request, only those related to "corrupt payments." The electronic databases contain documents from entire CCI email servers and hundreds of employee hard drives, the overwhelming majority of which have nothing to do with corrupt payments. These materials are not in the government's constructive possession for purposes of Rule 16, nor are they relevant to the criminal charges. The Companies have standing to object to the

production of the entire electronic databases, or to any effort to compel them to conduct expensive and burdensome "fishing expeditions" in the databases when they have already expended substantial resources producing relevant documents to the government, which have all been provided to Defendants in discovery.

Finally, the Companies have standing to object to requests for the production of documents in the Companies' exclusive possession that do not comply with the Federal Rules of Criminal Procedure. If Defendants had followed the normal procedure for seeking evidence in the possession of third parties and issued a Rule 17(c) subpoena, the Companies would have been able to move to quash or modify any improper requests. Instead, relying on *United States v. Stein*, 488 F. Supp. 2d 350 (S.D.N.Y. 2007), a single out-of-circuit decision directly contradicted by binding Ninth Circuit authority, Defendants have concocted a theory of "constructive possession" to attempt to trigger Rule 16. Defendants' motives for doing so are obvious, as they do not contest that they would be unable to obtain the documents requested pursuant to a proper Rule 17(c) subpoena. The Companies have standing to object to Defendants' attempt to circumvent Rule 17 because the Companies' interests would be directly and adversely affected if Defendants are successful.

II. ARGUMENT

A. Defendants Concede That The Companies May Intervene To Assert Claims Of Privilege

Defendants acknowledge that third parties may intervene in criminal proceedings to challenge the production of documents on privilege grounds. Defendants' Partial Opposition to Motion to Intervene by IMI plc and Control Components, Inc. at 2 ("Opp'n"). Indeed, "[a]s a general proposition, persons or corporations which are adversely affected by the disclosure of privileged material have the right to intervene, assuming standing, in pending criminal proceedings to seek protective orders, and if denied, to seek immediate appellate review." *United*

States v. Crawford Enterprises, Inc., 735 F.2d 174, 176 (5th Cir. 1984). As a result, Defendants agree it is "appropriate" for the Companies to intervene to oppose Defendants' Motion to Compel on "issues of privilege." Opp'n at 1.

Defendants ignore, however, that the Motion to Compel implicates far more of the Companies' privileged documents than the handful of privileged charts produced to the government pursuant to a non-waiver agreement. Defendants seek all of the "investigation materials" that Steptoe prepared in connection with a privileged internal investigation conducted on behalf of IMI and the Special Committee, including any interview memoranda, notes of witness interviews, and reports and supporting documentation. *Id.* at 23-25. Defendants do not contend that these materials are not privileged or that the privilege has been waived. Rather, they rely solely on the "constructive possession" argument and contend that the material should be produced under Rule 16 even though none of it is in the government's possession. *Id.*

In addition, Defendants seek the production of the entire electronic databases compiled by Steptoe and EY. The databases, however, contain a substantial volume of material that is protected by the attorney-client privilege and/or the attorney work product doctrine. For instance, the databases contain the contents of the entire hard drive of IMI's general counsel, which obviously includes counsel's work product and privileged communications. A search for emails on which IMI's general counsel was the author, recipient or copied results in 73,838 email messages. A similar search for another IMI in-house attorney results in 23,588 hits. Declaration of Brian M. Heberlig in Support of Reply Memorandum ¶ 4 ("Heberlig Reply Decl."). During the relevant time period, IMI was represented in various matters by the outside law firms Steptoe, Allen & Overy, and Pinsent Masons, among others. A search for emails using the domain names of these firms' email addresses in the to, from or cc line results in hits of 1,810, 3,617, and 1,700 emails, respectively. *Id.* ¶ 5.

Under no conceivable scenario are these privileged documents in the constructive possession of the government by virtue of CCI's Plea Agreement. The Plea Agreement states that CCI is obligated to produce to the Department of Justice (the "Department") upon request only "*non-privileged*" documents relating to "corrupt payments to foreign public officials or to employees of private customers . . . ." Plea Agreement ¶ 6 (Ex. C to Miller Decl., Docket # 101-5) (emphasis added). CCI has no obligation whatsoever to produce privileged documents to the Department. Thus, the government does not constructively possess the Steptoe investigation materials or any privileged documents in the electronic databases for purposes of Rule 16.

In addition, the CCI Plea Agreement binds only CCI. Plea Agreement ¶ 2. IMI has no cooperation agreement with the Department. The Steptoe investigation was conducted on behalf of IMI and the Special Committee. Declaration of Brian M. Heberlig ¶ 3 (Docket # 104) ("Heberlig Decl."). The Steptoe investigation materials are not in the possession of CCI. In fact, Steptoe has not even provided its interview memoranda and witness interview notes to anyone at IMI. Heberlig Reply Decl. ¶ 6. Because these materials are not in the possession of CCI, they cannot conceivably be in the government's constructive possession by virtue of CCI's Plea Agreement.

In sum, the Companies have standing to intervene in this proceeding to assert claims of privilege over *all* potentially privileged materials implicated by the Motion to Compel, not solely the small handful of documents in the government's possession.

B. <u>The Companies Have Standing To Intervene To Avoid Being Ordered To Conduct A Burdensome And Expensive Search For Documents Of No Or Doubtful Relevance</u>

The Companies also have standing to intervene in this matter because their interests will be directly and adversely affected if the Court grants the Motion to Compel. Defendants seek the production of a substantial volume of documents that are in the exclusive possession of the Companies. If the Court were to grant

the motion, it would be compelling the Companies to produce a volume of documents more than 1800 times greater than the documents they have provided to the government (approximately 75 million pages in the electronic databases versus approximately 40,000 pages produced to the Department).[1] The Companies have obvious standing to intervene to attempt to avoid the significant burden and expense that would be imposed by such an order.

Defendants' claim that the Companies would face "no burden" if the Court grants the Motion to Compel is based on a fundamental misunderstanding of both CCI's Plea Agreement and the contents of the electronic databases. Opp'n at 2. Defendants falsely assert that the Companies "committed to provide corporate records and data at the government's beck and call" in the Plea Agreement. *Id.* at 3. Defendants made similar assertions in the Motion to Compel in an attempt to mislead the Court into believing that CCI is obligated to produce any document in its possession to the government upon demand. *See* Motion to Compel at 6 ("CCI's Plea Agreement gives the government *the unqualified right* to demand from CCI the production of *any* non-privileged documents within CCI's control.") (emphasis added); *id.* at 8 ("CCI's Plea Agreement reflects that the government has the legal right to demand production by CCI of *any* of its non-privileged documents in connection with the government's case.") (emphasis added). To the contrary, the Plea Agreement gives the Department the ability to request only non-privileged documents relating to "*corrupt payments to foreign public officials or to employees of private customers* . . . ." Plea Agreement ¶ 6 (emphasis added). CCI is not obligated to produce any corporate record whatsoever, as Defendants' erroneously suggest. Thus, even if the "constructive possession" argument has any

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[1] CCI previously represented in its Sentencing Memorandum that the databases contained 5.5 million *pages* of documents. In preparing this reply memorandum, counsel determined that in fact there are approximately 5.6 million *documents* in the databases, which consist of approximately 75 million pages of material. Heberlig Reply Decl. ¶ 2 & n.1.

merit, which the Companies' dispute, the only CCI documents possibly in the government's constructive possession are those relating to "corrupt payments."

Defendants fail to acknowledge that the overwhelming majority of the approximately 75 million pages of documents in the electronic databases are unrelated to "corrupt payments" and therefore not in the government's constructive possession (nor, for that matter, are they relevant to the criminal charges in this case). As stated previously, the electronic databases include entire CCI email servers and forensic images of over 200 hard drives of company employees. Heberlig Decl. ¶ 5. No effort was made to screen these materials before they were compiled into the searchable databases. Indeed, the vast majority of these documents have never been reviewed by Steptoe or EY because they were not responsive to the various key word searches conducted to identify relevant documents relating to corrupt payments. Defendants are simply mistaken when they suggest that the government has the right under the Plea Agreement to ask CCI to produce the entire contents of the electronic databases. The Companies have standing to object to the production of the Companies' entire electronic databases.

The Companies also have standing to contest any effort to obtain a narrower order requiring the Companies to produce additional documents relating to "corrupt payments." Identifying such documents would largely duplicate the extensive efforts already undertaken by the Companies to identify and produce relevant documents -- organized by witness and by the improper payments that Steptoe identified in its investigation -- to the Department. In undertaking these efforts, counsel acted pursuant to instructions from IMI and the Special Committee to be fully cooperative with the Department and produce all relevant, non-privileged documents reflecting potentially improper payments to employees of state-owned and privately-owned CCI customers. Heberlig Decl. ¶ 8. Other than the handful of privileged charts at issue, all of these documents have been produced to Defendants in discovery.

CCI would suffer significant harm if ordered to search for additional documents relating to "corrupt payments," which would require time-consuming, burdensome and expensive document searching and review by the Companies' counsel. The Companies spent millions of dollars in attorneys' and accountants' fees cooperating with the Department's investigation and identifying the documents that have been provided to Defendants in discovery. CCI has already accepted responsibility for its conduct and has been punished by the strong sanctions imposed by the Court. Ordering CCI to perform Defendants' investigation for them, and conduct a highly subjective search for unspecified documents of questionable relevance, would be profoundly unfair at this stage of the proceedings. Thus, the Court should permit the Companies to intervene to protect their interests in this matter.

C. The Companies Have Standing To Challenge Defendants' Attempt To Obtain Documents In Their Possession Without Issuing A Rule 17(c) Subpoena

The Companies have standing to object to Defendants' attempt to obtain documents in the Companies' exclusive possession pursuant to Rule 16 based on a novel "constructive possession" theory that is an obvious attempt to avoid complying with Federal Rule of Criminal Procedure 17(c). Had Defendants complied with Rule 17(c), the normal procedure for obtaining evidence from a third party in a criminal case, the Companies would have had obvious standing to move to quash or modify any improper requests. Fed. R. Crim. P. 17(c)(2) ("[T]he court may quash or modify the subpoena if compliance would be unreasonable or oppressive."). Defendants also do not dispute that they would be unable to obtain the majority of the information requested pursuant to a Rule 17(c) subpoena, which requires requests to be specific, relevant and evidentiary. *See United States v. Nixon*, 418 U.S. 683, 701 (1974).

Defendants erroneously suggest that the Companies have no standing to object to the Motion to Compel because Defendants are seeking evidence pursuant to Rule 16 instead of Rule 17(c). For purposes of determining whether a company

has standing to intervene in a criminal case to avoid the production of privileged or confidential documents, "there is no discernible difference in effect between the enforcement of a Rule 17(c) subpoena and the grant of a Rule 16 discovery request." *United States v. RMI Co.*, 599 F.2d 1183, 1187 (3d Cir. 1979). Moreover, *RMI Co.* refutes Defendants' claim that no authority permits a party to intervene in a Rule 16 dispute for any reason other than privilege. *Id.* at 1185, 1187 (recognizing that intervention was appropriate in a Rule 16 dispute where a company argued "it would be prejudiced by the unprotected disclosure of the documents, containing as they do highly confidential and proprietary business information concerning the financial affairs"). Because both procedural vehicles have the potential to result in the disclosure of protected documents to a criminal defendant, a company may intervene in either proceeding to protect its interests. *Id.* at 1187. The case for intervention in a Rule 16 proceeding is particularly compelling where the documents at issue are in the third-party intervenor's possession.

Defendants' also criticize the Companies for not citing authority permitting a third party to intervene to challenge the government's attempt to obtain documents in the third party's possession in circumvention of Rule 17(c). Opp'n at 2, 8. The reason no such cases exist, however, is that aside from a single out-of-circuit, distinguishable case, *United States v. Stein*, 488 F. Supp. 2d 350 (S.D.N.Y. 2007) (addressed below), no court has adopted Defendants' novel position that documents in the actual possession of a third party are within the government's constructive possession for purposes of Rule 16.[2] Rather, when criminal defendants seek materials of the sort requested here, the proper procedure is to

[2] Even in *Stein*, moreover, the court permitted third party witness KPMG to "submit evidence and argument" in opposition to the defendants' attempt to obtain documents in KPMG's possession. 488 F. Supp. 2d at 356 n.22.

issue a Rule 17(c) subpoena to the party in possession of the documents.[3] Defendants' claim that under "well-settled law," CCI's plea agreement "unquestionably gives the government control of the documents Defendants seek," Opp'n at 8 n.4, is based solely on *Stein*, which is obviously not binding on this Court. No other court appears to have followed *Stein* and held that documents in the possession of a cooperating witness are within the government's constructive possession for purposes of Rule 16.

Stein is contradicted by binding Ninth Circuit law that Defendants do not address. In the Rule 16 context, the Ninth Circuit has limited the application of the constructive possession concept to documents possessed by *federal agencies* other than the prosecution. *See United States v. Bryan,* 868 F.2d 1032, 1036 (9th Cir. 1989); *United States v. Santiago*, 46 F.3d 885, 893 (9th Cir. 1995). Absent federal agency involvement, the Ninth Circuit treats "physical possession [of documents] as the dispositive factor" in determining whether materials are discoverable under Rule 16. *United States v. Fort*, 472 F.3d 1106, 1118 (9th Cir. 2007) (citing *United States v. Gatto*, 763 F.2d 1040, 1046-49 (9th Cir. 1985)). Thus, evidence created or gathered by third parties (including even state law enforcement authorities) "becomes subject to the disclosure obligation established by Rule 16(a)(1)(E) *when it passes into federal possession.*" *Fort*, 472 F.3d at 1118 (emphasis added); *see also id.* ("*Gatto*'s emphasis on possession as the triggering requirement for Rule 16 accords with decisions by this and other circuits.").

As Judge Graber described the holding in *Fort*, in an opinion concurring in the denial of a petition for rehearing *en banc*:

> For the purposes of Rule 16(a)(1)(E), this court has held, '[t]he prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any *federal*

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[3] *See, e.g., United States v. Wittig*, 250 F.R.D. 548, 552 (D. Kan. 2008); *United States v. Ferguson*, Crim. No. 3:06CR137 (CFD), 2007 WL 2815068 (D. Conn. Sept. 26, 2007).

> *agency* participating in the same investigation of the defendant.' *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989) (emphasis added). The majority opinion does not deem the prosecution to have knowledge of or access to anything generated by a state or local actor that is not *actually* known by and in the possession of the prosecutor. In other words, . . . *Fort* establishes no principle of constructive possession."

United States v. Fort, 478 F.3d 1099, 1100 (9th Cir. 2007) (Graber, J. concurring in the denial of rehearing *en banc*) (emphases in original).

If the constructive possession doctrine does not apply in the Rule 16 context to documents in the possession of state and local law enforcement authorities, it has even less application to documents in the possession of private entities such as CCI. In sum, *Stein* is flatly inconsistent with binding authority in the Ninth Circuit, where the "triggering requirement" for Rule 16 discoverability is that the records be in the "physical possession" of the government. *Fort*, 472 F.3d at 1118.

In any event, *Stein* is easily distinguishable from this case because KPMG's cooperation agreement required it to produce "'all documents, records, information, and other evidence in KPMG's possession, custody, or control as may be requested by the [U.S. Attorney's] Office or the IRS,'" and did not permit KPMG to assert any claim of privilege over contemporaneous records relating to the investigation. 488 F. Supp. 2d at 353. Here, as set forth above, CCI's Plea Agreement permits the government to request only non-privileged documents limited to the specific subject matter of "corrupt payments." Plea Agreement ¶ 6.

As the Companies will further explain if permitted to file a brief on the merits of the Motion to Compel, even if it were not directly contrary to Ninth Circuit law, there is good reason not to follow *Stein*. *Stein* dramatically alters the normal functioning of criminal discovery by theoretically permitting criminal defendants to gain access to any materials in the possession of a third-party cooperating witness. If *Stein* were to become widely accepted, such a rule would

create a significant disincentive to cooperating with the government. In all cases where a corporation produces documents, as in this case, it must necessarily collect and review more documents than it ultimately produces as responsive or relevant to the investigation. If private, third-party cooperating witnesses were required to satisfy the government's Rule 16 obligations, they would need to review every document in their possession -- usually, as in this case, after a settlement -- to determine whether it is "material to the preparation of the defense." This would impose enormous burdens on private companies, essentially imposing additional sanctions in the form of legal fees after companies have already settled with the government.

In addition, as Defendants suggest, the logic of *Stein* applies to the government's *Brady* obligations as well, which is neither practical nor advisable. *See* Motion to Compel at 36-42 (arguing that pursuant to *Stein*, the government has a *Brady* obligation to produce any exculpatory evidence in CCI's possession). CCI is not the prosecutor and cannot, nor should it be required to, identify what evidence is favorable to the defense for purposes of *Brady*. If *Stein* is correct, the government would be obligated to review all evidence in the physical possession of its cooperating witnesses for *Brady*, which has never been the law and would have negative consequences for the government and cooperating witnesses alike. *See United States v. Tadros*, 310 F.3d 999, 1005 (7th Cir. 2002) ("*Brady* does not require the Government to gather information or conduct an investigation on the defendant's behalf. . . . *Brady* prohibits suppression of evidence, it does not require the government to act as a private investigator and valet for the defendant, gathering evidence and delivering it to opposing counsel.").

Defendants make a series of overblown, and frankly ridiculous, claims that the Companies are trying to "orchestrate the government's case against Defendants," "run this show," engage in "gamesmanship," "cabin 'relevant' documents to documents they believe implicate Defendants," and "thwart Defendants' right to information." Opp'n at 3, 6, 7, 11. To the contrary, the

Companies seek only to protect their interests in not being compelled to produce privileged documents or engage in a burdensome and expensive search for unspecified documents through a process that does not comply with the Federal Rules of Criminal Procedure. If Defendants are able to identify with specificity admissible evidence that they need from the Companies to defend themselves, they are free to follow the rules and serve a Rule 17(c) subpoena. The Companies will respond in good faith and comply with any requests permitted by the Federal Rules of Criminal Procedure. The Court should not permit Defendants to circumvent this well-established procedure and engage in the broad "fishing expedition" represented by the Motion to Compel.

The Court should permit the Companies to intervene and be heard on these important issues over which they have obvious standing.

III. CONCLUSION

For the foregoing reasons, IMI and CCI respectfully request that the Court grant the Motion to Intervene and permit the Companies to submit a brief in opposition to the Defendants' Motion to Compel on or before October 21, 2009.

Dated: October 5, 2009

Respectfully submitted,

STEPTOE & JOHNSON LLP

By: _____

Brian M. Heberlig

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